

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar**

Thursday, December 08, 2016

Hearing Room

5B

10:00 AM

8:13-10223 Frank Jakubaitis

Chapter 7

Adv#: 8:15-01020 Padilla III et al v. Jakubaitis et al

#1.00 STATUS CONFERENCE RE: Complaint for 1. Turnover of Property of the Estate - 11 USC §542; 2. Revocation of Discharge - 11 USC 2 §727(d) (con'd from 6-2-16 per order approving stip. to cont entered 6-1-16)

Docket 1

Tentative Ruling:

Tentative for 12/8/16:
No status report?

Tentative for 3/10/16:
It sounds from the report that dispositive motions are being prepared on both sides. So, a continuance as requested by Plaintiff has some appeal, although the court notes this case has been pending one year.

Tentative for 1/28/16:
Why no status report? Have issues described from October 29, 2015 docket entry been addressed?

Tentative for 10/29/15:
Why has there been no apparent update, report or progress?

Tentative for 8/27/15:
Status of service/default?

Tentative for 4/23/15:

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CONT... Frank Jakubaitis

Chapter 7

Status conference continued to August 27, 2015 at 10:00 a.m. to afford time to resolve dismissal motions.

Party Information

Debtor(s):

Frank Jakubaitis

Represented By
Harlene Miller

Defendant(s):

Tara Jakubaitis

Pro Se

Frank Jakubaitis

Pro Se

Plaintiff(s):

Richard Marshack

Represented By
Arash Shirdel

Jeffery Golden

Represented By
Arash Shirdel

Carlos Padilla III

Represented By
Arash Shirdel

Trustee(s):

Jeffrey I Golden (TR)

Pro Se

Jeffrey I Golden (TR)

Represented By
Jeffrey I Golden (TR)

U.S. Trustee(s):

United States Trustee (SA)

Pro Se

**United States Bankruptcy Court
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10:00 AM

8:13-20028 Tara Jakubaitis

Chapter 7

Adv#: 8:15-01426 Marshack v. Jakubaitis et al

#2.00 STATUS CONFERENCE RE: Adversary Complaint for 1. Turnover of Property of The Estate - 11 U.S.C. Section 542; 2. Avoidance of Fraudulent Transfer - 11 U.S.C. Section 544; 3. Revocation of Discharge - 11 U.S.C. Section 727(d) (con't from 6-2-16 per order approving stip to cont s/c entered 6-1-16)

Docket 1

Tentative Ruling:

Tentative for 12/8/16:
No status report?

Tentative for 3/10/16:
See #6 and 7.

Tentative for 1/14/16:
Status conference continued to March 10, 2016 at 11:00 a.m. to coincide with motion to dismiss.

Party Information

Debtor(s):

Tara Jakubaitis

Represented By
Christopher P Walker
Fritz J Firman
Benjamin R Heston

Defendant(s):

Frank Jakubaitis

Pro Se

Tara Jakubaitis

Pro Se

Plaintiff(s):

Richard Marshack

Represented By

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CONT... Tara Jakubaitis

Chapter 7

Arash Shirdel

Trustee(s):

Richard A Marshack (TR)

Pro Se

Richard A Marshack (TR)

Pro Se

U.S. Trustee(s):

United States Trustee (SA)

Pro Se

**United States Bankruptcy Court
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10:00 AM

8:15-13008 Anna's Linens, Inc.

Chapter 11

Adv#: 8:15-01482 P & A Marketing, Inc. et al v. Gladstone et al

#3.00 STATUS CONFERENCE RE: Complaint For: 1. Fraud; 2. Negligent Misrepresentation; 3. Breach of Implied Covenant Of Good Faith and Fair Dealing; 4. Breach of Fiduciary Duty; 5. Aiding and Abetting Fraud; 6. Aiding and Abetting Breach of Fiduciary Duty; 7. Breach of Fiduciary Duty- Insider; 8. Unjust Enrichment; and 9. Equitable Subordination (another summons issued on 1-20-16)
(cont'd from 9-29-16 per order approving stip. entered 7-27-16)

Docket 7

***** VACATED *** REASON: CONTINUED TO MARCH 2, 2017 AT
10:00 A.M. PER ORDER GRANTING STIPULATION ENTERED
11/2/2016**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Anna's Linens, Inc.

Represented By
David B Golubchik
Lindsey L Smith
Eve H Karasik
John-Patrick M Fritz
Todd M Arnold
Ian Landsberg
Juliet Y Oh

Defendant(s):

Downtown Capital Partners, LLC	Pro Se
DCP Linens Lenders, LLC	Pro Se
LTD	Pro Se
Fidelity & Guaranty Life Insurance	Pro Se

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CONT... Anna's Linens, Inc.

Chapter 11

Salus CLO 2012-1, Ltd.	Pro Se
Anna's Linens, Inc.	Pro Se
Does 1-25	Pro Se
Salus Capital Partners, LLC	Pro Se
Loren Pannier	Pro Se
Scott Gladstone	Pro Se
Alan Gladstone	Pro Se
Kevin Reilly	Pro Se
Janet Grove	Pro Se
J.E. Rick Bunka	Pro Se
Shepherd Pryor	Pro Se

Other Professional(s):

KOGAN LAW FIRM	Represented By Michael S Kogan
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Plaintiff(s):

Shewak Lajwanti Home Fashions,	Represented By Steven T Gubner Michael W Davis
Welcome Industrial Corporation	Represented By Steven T Gubner Michael W Davis
P & A Marketing, Inc.	Represented By Steven T Gubner Michael W Davis
Panda Home Fashions LLC	Represented By Steven T Gubner Michael W Davis

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CONT... Anna's Linens, Inc.

Chapter 11

U.S. Trustee(s):

United States Trustee (SA)

Pro Se

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10:00 AM

8:09-22699 Cheri Fu

Chapter 7

Adv#: 8:16-01098 Joseph v. United States Of America

**#4.00 STATUS CONFERENCE RE: Complaint for Refund of Income Taxes.
(cont'd from 9-29-16 per order cont. status conf. entered 8-02-16)**

Docket 1

***** VACATED *** REASON: CONTINUED TO 2-23-2017 AT 10:00
A.M. PER ORDER APPROVING SIXTH STIPULATION TO EXTEND
TIME TO ANSWER OR OTHERWISE RESPOND TO THE TRUSTEE'S
COMPLAINT, CONTINUING THE DATE TO FILE THE JOINT STATUS
REPORT ENTERED 11-15-16**

Tentative Ruling:

Party Information

Debtor(s):

Cheri Fu

Represented By

Evan D Smiley

John T. Madden

Beth Gaschen

Susann K Narholm - SUSPENDED -

Mark Anchor Albert

Defendant(s):

United States Of America

Pro Se

Joint Debtor(s):

Thomas Fu

Pro Se

Plaintiff(s):

James J Joseph

Represented By

A. Lavar Taylor

Trustee(s):

James J Joseph (TR)

Represented By

James J Joseph (TR)

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CONT... **Cheri Fu**

Chapter 7

Paul R Shankman
Lisa Nelson

James J Joseph (TR)

Pro Se

U.S. Trustee(s):

United States Trustee (SA)

Pro Se

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10:00 AM

8:14-13094 Gregory Michael Daw

Chapter 7

Adv#: 8:16-01134 Marshack v. Quiett

#5.00 STATUS CONFERENCE RE: Complaint For: (1) Declaratory Relief [11 U.S.C. § 541(a)(2); FRBP 7001(1), 7001(2), 7001(9)]; (2) Quiet Title [Cal. Code Civ. Proc. §760.020]; (3) Avoidance & Recovery of Inentional Fraudulent Transfer [11 U.S.C. §§544, 548, 550; Cal Civ. Code §§3439.04, 3439.07]; (4) Avoidance & Recovery of Constructive Fraudulent Transfer [11 U.S.C. §§544, 548, 550; Cal. Civ. Code §§3439.04, 3439.05, 3439.07]; and (5) Turnover of Property [11 U.S.C. §542].
(cont'd from 8-4-16)

Docket 1

Tentative Ruling:

Tentative for 12/8/16:

Status Conference continued to February 2, 2017 at 10:00 am as holding date. Appearance optional.

Tentative for 11/3/16:

Status conference continued to December 8, 2016 at 10:00 a.m. Appearance optional.

Tentative for 8/4/16:

Status conference continued to November 3, 2016 at 10:00 a.m.

Refer to mediation. Order appointing mediator to be lodged by plaintiff within 10 days. One day of mediation to be completed by October 15, 2016.

Party Information

Debtor(s):

Gregory Michael Daw

Represented By
Jerome S Demaree

Defendant(s):

Leslie Quiett

Pro Se

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CONT... Gregory Michael Daw

Chapter 7

Plaintiff(s):

Richard A. Marshack

Represented By
D Edward Hays
Sarah C Boone

Trustee(s):

Richard A Marshack (TR)

Represented By
David Wood
D Edward Hays

Richard A Marshack (TR)

Pro Se

U.S. Trustee(s):

United States Trustee (SA)

Pro Se

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10:00 AM

8:15-12496 Jana W. Olson

Chapter 7

Adv#: 8:16-01168 United States Trustee v. Olson

**#6.00 STATUS CONFERENCE RE: Complaint Objecting to Discharge Pursuant to 11
U.S.C. Section 727
(cont'd from 11-17-16) HOLDING DATE**

Docket 1

***** VACATED *** REASON: CONTINUED TO 3-23-2017 AT 10:00
A.M. PER US TRUSTEE'S REQUEST ON 12-06-16**

Tentative Ruling:

Tentative for 11/17/16:

Status conference continued to December 8, 2016 at 10:00 a.m.

Party Information

Debtor(s):

Jana W. Olson

Pro Se

Defendant(s):

Jana W. Olson

Pro Se

Plaintiff(s):

United States Trustee

Represented By
Frank Cadigan

Trustee(s):

Richard A Marshack (TR)

Represented By
Sarah Cate Hays
D Edward Hays
Ashley M Teesdale

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10:00 AM

8:16-13125 Ulf Daemmrich

Chapter 7

Adv#: 8:16-01205 Levin v. Daemmrich

**#7.00 STATUS CONFERENCE RE: Complaint to determine dischargeability of debt
[11 U.S.C. Section 523(a)(5)]**

Docket 1

Tentative Ruling:

Tentative for 12/8/16:

Status Conference continued to January 15, 2017 at 10:00 am as holding
date pending prove up in chambers by affidavit.

Party Information

Debtor(s):

Ulf Daemmrich

Represented By
Desiree V Causey

Defendant(s):

Ulf Daemmrich

Pro Se

Plaintiff(s):

Nancy Levin

Represented By
Halli B Heston
Richard G Heston

Trustee(s):

Karen S Naylor (TR)

Pro Se

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10:00 AM

8:14-14529 Paul Edalat

Chapter 7

Adv#: 8:16-01177 Khorasani v. Luberski, Inc.

#8.00 STATUS CONFERENCE RE: Complaint for (1) Declaratory Relief RE Validity, Priority, and Extent of Alleged Liens; and Avoidance and Recovery of Unperfected Liens Pursuant to 11 USC Sections 544(a)(3) [11 USC Sections 544, 550 and FRBP Rule 7001] (con't from 10-6-16)

Docket 1

Tentative Ruling:

Tentative for 12/8/16:
See #10. Continue approximately 45 days.

Tentative for 10/6/16:
Status conference continued to December 8, 2016 at 10:00 a.m. to follow hearing on dismissal motion.

Party Information

Debtor(s):

Paul Edalat

Represented By
D Edward Hays
Lisa G Salisbury

Defendant(s):

Luberski, Inc.

Pro Se

Plaintiff(s):

Mehdi Khorasani

Represented By
Lee H Durst

Trustee(s):

Weneta M Kosmala (TR)

Represented By
Reem J Bello
Jeffrey I Golden

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CONT...

Paul Edalat

Faye C Rasch

Chapter 7

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10:00 AM

8:14-14529 Paul Edalat

Chapter 7

Adv#: 8:14-01283 Weneta M.A. Kosmala, solely in her capacity as the v. Edalat et al

#8.10 STATUS CONFERENCE RE: Complaint For: (1) Declaratory Relief that the Vehicles are Property of the Estate; (2) Turnover of the Vehicles Pursuant to 11 U.S.C. Section 542(a); (3) Injunctive Relief Related to the Vehicles; (4) Declaratory Relief that the Interests in the Companies and Related Property Pursuant to 11 U.S.C. Section 542(a); (6) Injunctive Relief Related to The Companies; (7) Declaratory Relief that the Memorabilia are Property of The Estate; (8) Turnover of the Memorabilia Pursuant to 11 U.S.C. Section 542(a); and (9) Injunctive Relief Related to The Memorabilia.
(cont from 11-10-16)

Docket 1

Tentative Ruling:

Tentative for 12/8/16:
Status report?

Tentative for 11/10/16:
Stipulation for entry of judgment regarding Mali Saatchi has been filed, with an order approving the stipulation entered on October 12, 2016. Still no disposition regarding O'Gara Coach Beverly Hills and Ed Bilezekchian. Should the case be dismissed as to these parties?

Tentative for 10/6/16:
What is the status regarding parties not involved in latest stipulation? Should the case as to them be dismissed?

Tentative for 7/28/16:
Is this resolved by the recent stipulation?

Tentative for 6/14/16:

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CONT... Paul Edalat

Chapter 7

Is this moot in view of #4?

Tentative for 6/2/16:
See #13.

Tentative for 5/26/16:
Status conference continued to June 2, 2016 at 11:00 a.m. to coincide with
motion for judgment on the pleadings. What is the status on reported
settlement?

Tentative for 12/3/15:
Status conference continued to February 25, 2015 at 10:00 a.m.

Tentative for 10/1/15:
So, is this settled, or not?

Tentative for 7/23/15:
Status?

Tentative for 1/14/15:
Deadline for completing discovery: May 30, 2015
Last date for filing pre-trial motions: June 15, 2015
Pre-trial conference on: June 25, 2015 at 10:00 a.m.
Joint pre-trial order due per local rules.

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CONT... Paul Edalat

Chapter 7

Refer to mediation. Order appointing mediator to be lodged by plaintiff within 10 days. One day of mediation to be completed by May 1, 2015.

Party Information

Debtor(s):

Paul Edalat

Represented By
Dennis Winters

Defendant(s):

Farah Barghi

Pro Se

Mali Aatchi

Pro Se

Ed Bilezekchian

Pro Se

Paul Edalat

Pro Se

O'Gara Coach Beverly Hills

Pro Se

Plaintiff(s):

Weneta M.A. Kosmala, solely in her

Represented By
Jeffrey I Golden

Trustee(s):

Weneta M Kosmala (TR)

Pro Se

Weneta M Kosmala (TR)

Pro Se

U.S. Trustee(s):

United States Trustee (SA)

Pro Se

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10:00 AM

8:14-14529 Paul Edalat

Chapter 7

Adv#: 8:14-01283 Weneta M.A. Kosmala, solely in her capacity as the v. Edalat et al

#9.00 Order to Show Cause Hearing
(cont'd from 11-10-16)

Docket 0

Tentative Ruling:

Tentative for 12/8/16:
See #8 and #10.

Status?

Party Information

Debtor(s):

Paul Edalat

Represented By
D Edward Hays
Lisa G Salisbury

Defendant(s):

Farah Barghi

Represented By
D Edward Hays
Jeffrey B Smith

Mali Aatchi

Represented By
D Edward Hays
Jeffrey B Smith

Ed Bilezekchian

Pro Se

Paul Edalat

Represented By
D Edward Hays

O'Gara Coach Beverly Hills

Pro Se

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CONT... Paul Edalat

Chapter 7

Plaintiff(s):

Mehdi Khorasani

Represented By

Lee H Durst - SUSPENDED -

MK Investments, Inc

Represented By

Lee H Durst - SUSPENDED -

Weneta M.A. Kosmala, solely in her

Represented By

Jeffrey I Golden

Trustee(s):

Weneta M Kosmala (TR)

Represented By

Reem J Bello

Jeffrey I Golden

Faye C Rasch

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11:00 AM

8:14-14529 Paul Edalat

Chapter 7

Adv#: 8:16-01177 Khorasani v. Luberski, Inc.

#10.00 Motion to Dismiss First Amended Complaint Under FRCP 12(b)(6)

Docket 8

Tentative Ruling:

Tentative for 12/8/16:

The court notes that according to the State Bar of California website, Plaintiff's counsel Lee H. Durst (SBN # 69704) is currently not eligible to practice law in California, effective August 28, 2016. Nonetheless, on September 13, 2016, Mr. Durst filed and signed a first amended complaint (docket no. 6) in this adversary proceeding. It is unclear whether the first amended complaint filed by Mr. Durst is null, therefore leaving the initial complaint as the only pleading to be considered, or whether the first amended complaint remains effective provided that new counsel agrees to represent Plaintiff. The court invites further briefing from the parties on this issue. The matter will be continued to a later date to allow for Plaintiff to obtain new counsel.

Continue approximately 45 days.

Party Information

Debtor(s):

Paul Edalat

Represented By
D Edward Hays
Lisa G Salisbury

Defendant(s):

Luberski, Inc.

Represented By
Daniel Leibowitz

Plaintiff(s):

Mehdi Khorasani

Represented By
Lee H Durst - SUSPENDED -

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CONT... Paul Edalat

Chapter 7

Trustee(s):

Weneta M Kosmala (TR)

Represented By
Reem J Bello
Jeffrey I Golden
Faye C Rasch

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11:00 AM

8:13-10223 Frank Jakubaitis

Chapter 7

Adv#: 8:15-01020 Padilla III et al v. Jakubaitis et al

#11.00 Defendant's Motion to Dismiss Adversary Complaint For Failure To State A Claim Upon Which Relief Can Be Granted

Docket 98

Tentative Ruling:

This is Debtor Frank Jakubaitis' ("Jakubaitis") motion to dismiss Plaintiffs Carlos Padilla III, Jeffrey Golden, and Richard Marshack's first amended complaint (collectively, "Plaintiffs"). Plaintiffs' in their first amended complaint assert two causes of action, seeking turnover of estate property under 11 U.S.C. § 542 and revocation of discharge under 11 U.S.C. 727(d). Mr. Jakubaitis and his wife Tara Jakubaitis ("Mrs. Jakubaitis") filed separate chapter 7 petitions, with Mr. Jakubaitis filing a petition on January 9, 2013 and Mrs. Jakubaitis filing a petition on December 23, 2013 (collectively, "Defendants"). Defendants have since received discharges in their respective cases. The first amended complaints, motions to dismiss, and oppositions filed in Defendants' adversary proceedings are virtually identical (the only additional argument raised in the motion to dismiss in Mrs. Jakubaitis' adversary proceeding is that Plaintiffs cannot seek to revoke a discharge for Debtor, as he is not a party to that case). Accordingly, this discussion applies to both motions to dismiss (calendar numbers 11 and 12).

A. Pleading Requirements

Fed. R. Civ. P. Rule 8 requires that a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." A pleading that does not state a claim upon which relief can be granted may be dismissed by the respondent pursuant to Fed. R. Civ. P. Rule 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v Twombly*, 550 U.S. 544 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A pleading that merely "offers 'labels and conclusions' or a formulaic recitation of the elements of a cause of action will not do." *Id.* ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not

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CONT... **Frank Jakubaitis**
suffice").

Chapter 7

"A complaint should not be dismissed under the rule 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957); see also, *Amfac Mortgage Corp. v. Arizona Mall of Tempe, Inc.*, 583 F.2d 426, 429-30 (9th Cir.1978). All allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. *Western Reserve Oil & Gas Co. v. New*, 765 F.2d 1428, 1430 (9th Cir.1985), cert. denied, 474 U.S. 1056, 106 S. Ct. 795 (1986). If a complaint is accompanied by attached documents, the court is not limited by the allegations contained in the complaint. *Amfac Mortgage Corp.*, 583 F.2d at 429. These documents are part of the complaint and may be considered in determining whether the plaintiff can prove any set of facts in support of the claim." *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987).

B. 11 U.S.C. § 542 Turnover

"Bankruptcy Code § 542(a) grants a bankruptcy trustee the power to recover property of the debtor's estate or such property's value. With this power, the trustee may seek recovery from entities having 'possession, custody, or control' of the property sought, whether the property was in the entity's possession, custody, or control at the time the motion was filed or at any other point during the pendency of the bankruptcy case." *Shapiro v. Henson*, 739 F.3d 1198, 1199 (9th Cir. 2014) Under the Bankruptcy Code, the filing of a bankruptcy petition creates a bankruptcy estate. § 541(a). With certain exceptions, the estate is comprised of the debtor's legal or equitable interests in property 'wherever located and by whomever held.' *Id.* As the Supreme Court has noted, 'Congress intended a broad range of property to be included in the estate.' *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204, 103 S.Ct. 2309, 76 L.Ed.2d 515 (1983); see also *Chappel v. Proctor (In re Chappel)*, 189 B.R. 489, 493 (9th Cir.BAP 1995) ('The legislative history of the Bankruptcy Code reveals that the concept of property of the estate is to be interpreted broadly.'). *Gladstone v. U.S. Bancorp*, 811 F.3d 1133, 1139 (9th Cir. 2016).

Here, Plaintiffs allege sufficient facts for their § 542 cause of action to survive the motion to dismiss. More specifically, Plaintiffs allege that Defendants hid various assets belonging to the bankruptcy estate, "including but not limited to cash and interests in bank accounts, interests in vehicles, including a Corvette, a United States issued patent (USPTO No. 20060045301)." First Amended Complaint at ¶ 27. As noted above, Plaintiffs do not only

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Frank Jakubaitis

Chapter 7

summarily state that Defendants have hidden assets. Rather, Plaintiffs list specific estate property held by Defendants during the pendency of their bankruptcy actions that should be turned over. Because the court must assume Plaintiffs' facts as true at this juncture, Defendants' conclusory assertions sufficient facts are not pled is unpersuasive. Even less persuasive is the Defendants' various denials that the mentioned assets even exist. While the allegations might be false, that is a factual matter to be determined at trial or in Rule 56 motion based on evidence; it is not appropriate for a Rule 12(b) motion where allegations are assumed to be true. Accordingly, this portion of the motion cannot be granted.

C. 11 U.S.C. § 727(d)

"Section 727(d)(1)... provides that a Chapter 7 discharge may be revoked if the 'discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge....' " *Jones v. U.S. Tr., Eugene*, 736 F.3d 897, 899 (9th Cir. 2013). "[Plaintiff] must at least show that, but for the fraud, the discharge would not have been granted." *In re Nielsen*, 383 F.3d 922, 925 (9th Cir. 2004).

"As a general rule, a plaintiff must prove that the debtor acquired or became entitled to acquire property of the estate and knowingly and fraudulently failed to report or deliver the property to the trustee, in order to obtain relief under § 727(d)(2). Both elements must be met and the plaintiff must prove that the debtor acted with the knowing intent to defraud." *In re Bowman*, 173 B.R. 922, 925 (B.A.P. 9th Cir. 1994)

Again, Plaintiffs here have alleged sufficient facts for their § 727(d) cause of action to survive. According to Plaintiffs, Defendants have engaged in various fraudulent acts that would warrant revocation of discharge:

- Defendants 'intentionally and fraudulently under reported their income in their various schedules in order to qualify for a Chapter 7 bankruptcy, if in reality they had disclosed their true income, they would not qualify for a Chapter 7 and would instead have to file a Chapter 13...' First Amended Complaint at ¶ 28.
- Defendants have "transferred various assets, including the Bui Judgment to their friends and co-conspirators, in order to hide the same from creditors and the estate." First Amended Complaint at ¶30.
- Defendants have "used and continue to use either straw-men or other forms

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and methods to conceal their assets..." First Amended Complaint at ¶ 32.

- "Had Plaintiffs been aware of such misrepresentations, they could and would have objected to the discharge." First Amended Complaint at ¶ 40.

These alleged facts, when construed in favor of the non-moving party (Plaintiffs), sufficiently state a *prima facie* § 727 claim. Defendants argue that Plaintiffs had knowledge of these alleged misrepresentations prior to the discharge. But this is, of course, a factual dispute inappropriate for a Rule 12(b) motion. But in support, Defendants argue that this court should take judicial notice of certain facts that contradict Plaintiffs' allegations. However, at least one of Defendants' argued facts is a mere assertion that Plaintiffs raised these same allegations in a judgment debtor exam prior to discharge—no transcripts of said exam or any other evidence is provided hence the court has no means for judicial notice as is required in Fed. R. Evid. 201(c). In addition, the other alleged facts raised by Defendant do not appear to materially contradict Plaintiffs' allegations, at least not sufficiently for an order under Rule 12(b). Thus, it still does not seem appropriate to dismiss Plaintiffs' first amended complaint in light of Defendants' arguments.

Defendants also raise the argument that Trustee Richard Marshack cannot seek a revocation of discharge against Mr. Jakubaitis, and that Trustee Jeffrey Golden cannot seek a revocation of discharge against Mrs. Jakubaitis because they were not the respective trustees for these estates. These arguments are very likely true, but do not warrant dismissal of Plaintiff's amended complaint, as these parties can simply be removed from any except the pertinent claims for relief instead.

Deny

Party Information

Debtor(s):

Frank Jakubaitis

Represented By
Harlene Miller
Fritz J Firman
Arash Shirdel

Defendant(s):

Tara Jakubaitis

Represented By

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Fritz J Firman

Represented By
Fritz J Firman

Plaintiff(s):

Richard Marshack

Represented By
Arash Shirdel

Jeffery Golden

Represented By
Arash Shirdel

Carlos Padilla III

Represented By
Arash Shirdel

Trustee(s):

Jeffrey I Golden (TR)

Represented By
Jeffrey I Golden (TR)
Arash Shirdel

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8:13-20028 Tara Jakubaitis

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Adv#: 8:15-01426 Marshack v. Jakubaitis et al

#12.00 Defendant's Motion to Dismiss Adversary Complaint For Failure To State A Claim Upon Which Relief Can Be Granted

Docket 47

Tentative Ruling:

See #11.

Party Information

Debtor(s):

Tara Jakubaitis

Represented By
Christopher P Walker
Fritz J Firman
Benjamin R Heston

Defendant(s):

Frank Jakubaitis

Represented By
Fritz J Firman

Tara Jakubaitis

Represented By
Fritz J Firman

Plaintiff(s):

Richard Marshack

Represented By
Arash Shirdel

Trustee(s):

Richard A Marshack (TR)

Represented By
Arash Shirdel

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8:05-50128 William E Preston

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Adv#: 8:16-01243 Preston Music Group, Inc. v. Preston et al

#13.00 Motion For Application For Temporary Restraining Order And Order To Show Cause Why A Preliminary Injunction Should Not Enter

Docket 6

Tentative Ruling:

This is Preston Music Group, Inc.'s ("PMGI") application seeking a temporary restraining order and order to show cause why a preliminary injunction should not issue.

William Preston ("Debtor") filed a chapter 11 petition on May 25, 2006. At the time, Trustee claimed an interest in all royalties owed on debtor's music, with Broadcast Music, Inc. ("BMI") paying these royalties to the Trustee. On June 6, 2006, Debtor passed away. On July 15, 2008, BMI was informed that PMGI was seeking disqualification of the bankruptcy trustee. Consequently, BMI placed a hold on the distribution of Debtor's royalties pending resolution.

On December 8, 2015, the bankruptcy trustee filed a motion seeking approval of a Global Settlement Agreement ("Agreement"). The defendants in the instant adversary proceeding (Co-Administrators of the Estate of William Everett Preston and BMI) were not parties to the Agreement. The Agreement contains the following provision:

"Except as otherwise provided in the Settlement Agreement, all intangible personal property of the Debtor currently in possession, custody or control of the Bankruptcy Trustee on behalf of the Bankruptcy Estate shall be transferred conveyed, and delivered to PMGI without warranty or representation of any title. For purposes of this Settlement Agreement, intangible personal property shall be as defined in Section 9102 of the California Commercial Code including all intellectual property rights in any form or media. All such intangible personal property of the Debtor to which the Bankruptcy Trustee

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has asserted and/or may assert any rights to on behalf of the Bankruptcy Estate is hereby granted, conveyed, and returned to PMGI..."(emphasis added). See Exhibit 1 at 27 attached to Motion to Approve Comprise Under Rule 9019, docket number 817 and Exhibit 2 attached to the instant motion.

On January 14, 2016, the court entered an order granting the bankruptcy trustee's motion and approving the Agreement. At the time the order was entered, BMI was withholding approximately \$279,232.10 of Debtor's royalties. On January 29, 2016, BMI received a letter from PMGI and the bankruptcy trustee informing BMI of the settlement, and instructing BMI to distribute \$226,196.09 of royalties to the bankruptcy trustee and the remaining \$53,036.01 of royalties to PMGI. BMI made these distributions on February 10, 2016. Therefore, as the court reads it, the bankruptcy estate no longer claims any interest whatsoever in the royalties. Indeed, the Trustee has effectively closed the bankruptcy estate; a hearing was held on the Chapter 7 Trustee's final report on October 25, 2016. At this hearing the court approved the final fees and costs as prayed, leaving an administratively insolvent estate. The Trustee was to submit an order on that approval, but apparently has not done so as of this writing as the docket does not reveal an entered order. The Trustee has not filed anything in conjunction with PMGI's motion at bar. .

On July 27, 2016, BMI received a letter from Larry Watkins, counsel for the Co-Administrators of Debtor's probate estate. This letter informed BMI of a state court action currently pending. The letter informed BMI that the Co-Administrators objected to the disbursement of further royalties pending resolution of their claims. On September 21, 2016, Co-Administrator Lettice Preston filed a petition for declaration and order that PMGI is owned by Debtor's probate estate.

By this adversary proceeding filed November 9, 2016; Plaintiff PMGI raises two claims for relief, both in the nature of tortious interference with business relations or with contract. These are claims based in state law.

The court is not persuaded that it either can or should issue injunctive relief here. First, the court doubts that it has continuing jurisdiction. Rather, since there is

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reportedly an earlier action pending in Los Angeles Superior Court, Probate Case No.B0099223, this has all of the earmarks of a case for which the court should abstain.

1. Abstention

Not every matter for which there might be "related to" jurisdiction is appropriately determined by the bankruptcy court. Non-core matters in which the bankruptcy estate is only tangentially involved, and there is no compelling question of federal law raised, nor is administration of the estate impacted, the court may abstain in favor of state court matters already pending. Abstention is governed by 28 U.S.C. § 1334(c)(1) which provides:

"Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State court or respect for the State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11."

"A bankruptcy court has the power to permissively abstain from hearing any matter, *sua sponte*.(citations omitted). As long as the parties have an opportunity to be heard, the decision to abstain is left up to the sound discretion of the bankruptcy court (citations omitted)." *In re Meruelo Maddux Properties, Inc.*, 2013 WL 1615784, at *7 (B.A.P. 9th Cir. 2013). "Where a bankruptcy court may abstain from deciding issues in favor of an imminent state court trial involving the same issues, cause may exist for lifting the stay as to the state court trial. See *In re Castlerock Properties*, 781 F.2d 159, 163 (9th Cir.1986)." *In re Tucson Estates, Inc.*, 912 F.2d 1162, 1166 (9th Cir. 1990).

"[T]he factors a court should consider when deciding whether to abstain:

(1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4)

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the presence of a related proceeding commenced in state court or other nonbankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted "core" proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden of [the bankruptcy court's] docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of nondebtor parties." *In re Tucson Estates, Inc.*, 912 F.2d 1162, 1167 (9th Cir. 1990).

Virtually all of these *Tucson* factors support abstention. There is no longer in practical terms any estate to administer. The issues raised in the adversary proceeding concern only state law. Those issues do not appear to be difficult or unsettled. There is certainly a related proceeding pending in state court, and apparently it has been pending in the Los Angeles Superior Court for a considerable period preceding this adversary proceeding. There is no jurisdictional basis for involving the bankruptcy court except §1334. The matters in dispute are remote from the concerns of the bankruptcy estate. No "core" nature of the issues is alleged or appears applicable. It is completely feasible to sever the claims from the bankruptcy proceeding; indeed, the estate can or should be promptly closed without any involvement in this action. The bankruptcy court's docket is a factor favoring abstention. This court has plenty of true bankruptcy matters to handle without borrowing what is in practical terms a pure state law dispute between non-debtor parties better handled in Superior Court. Forum shopping may not be implicated either way, and so this is probably a neutral factor. The court is not informed whether a jury is indicated or should be involved, but to the extent that either side wants one, this is an additional factor favoring abstention as the bankruptcy court is ill-equipped to accommodate jury trials. The presence of non-debtor parties is obvious. Indeed, this is a dispute between non-debtors over property that is no longer even property of the estate. There will be no advantage or disadvantage for any creditor other than PMGI deriving from this action, and so this is

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no reason to keep the case open.

"[I]f the Sale Order is presumed to be valid, the bankruptcy court lacked jurisdiction to determine rights to the property because it was no longer property of the estate." *In re Rodeo Canon Dev. Corp.*, 392 F. App'x 576, 579 (9th Cir. 2010); see generally *In re Rodeo Canon Dev. Corp.*, 2010 WL 6259764 (B.A.P. 9th Cir. Oct. 28, 2010). No one seems to challenge that the sale has been completed, and so the only possible reason for the court to be involved would be if its sale/compromise order approving the Agreement were somehow contested. But that does not appear to be the case and the order of January 14, 2016 has long ago become final. Rather, from the papers file by Ms. Preston it would appear that the dispute is over the ownership of PMGI.

"The bankruptcy court has jurisdiction over all property of a debtor as of the commencement of a bankruptcy case and all property of the estate. 28 U.S.C. § 1334 (e)(1)[.]" *In re Stokes*, 2013 WL 5313412, at *3 (B.A.P. 9th Cir. 2013). "It is axiomatic that *in rem* jurisdiction over an asset terminates once the bankruptcy estate relinquishes all rights and interests in the asset. See *In re Hall's Motor Transit Co.*, 889 F.2d 520, 522 (3d Cir.1989) ('The bankruptcy court's jurisdiction does not follow the property, but rather, it lapses when the property leaves the debtor's estate.');" *Elscint, Inc. v. First Wis. Fin. Corp. (Matter of Xonics, Inc.)*, 813 F.2d 127, 131 (7th Cir.1987) (once property of the estate is sold, the bankruptcy court must obtain a new source of federal jurisdiction); see also *Gardner v. United States (In re Gardner)*, 913 F.2d 1515, 1518 (10th Cir.1990) ('A bankruptcy court has jurisdiction over disputes regarding alleged property of the bankruptcy estate at the outset of the case. When property leaves the bankruptcy estate, however, the bankruptcy court's jurisdiction typically lapses, and the property's relationship to the bankruptcy proceeding comes to an end.') (citation omitted)." *Id.* "Consequently, as was true under the Act, a bankruptcy court ordinarily lacks jurisdiction to adjudicate ownership disputes involving former property of the estate. See *McQuaid v. Owners of NW 20 Real Estate (Matter of Fed. Shopping Way, Inc.)*, 717 F.2d 1264, 1272 (9th Cir.1983) (decided under the Bankruptcy Act)('[W]here property is outside the possession of the

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bankruptcy court and is held adversely to the trustee, the court, absent consent, has no jurisdiction to adjudicate conflicting claims of title to the property, even where one of the claims is asserted by the trustee himself."); *see also Rodeo Canon Dev. Corp. v. Goodrich (In re Rodeo Canon Dev. Corp.)*, 392 F. App'x 576, 579 (9th Cir.2010) (citing *Matter of Fed. Shopping Way, Inc.* and determining that the bankruptcy court lacked jurisdiction to adjudicate ownership of property when the subject property was sold, and, thus, was no longer property of the estate); *see also In re Gardner*, 913 F.2d at 1519 (also citing *Matter of Fed. Shopping Way, Inc.*, in support of its determination that a bankruptcy court lacks jurisdiction to resolve disputes between third-parties as to non-estate property)." *Id.* The holding of *Stokes* is applicable here. The *Stokes* courts ultimately held that "[u]nder the rule articulated in *Federal Shopping Way* (and reaffirmed in *Rodeo Canon*), however, the bankruptcy court lacked jurisdiction under 28 U.S.C. § 1334(e) to adjudicate disputes as to ownership and property rights in the Malpractice Claims once the asset was sold and transferred from the estate. The bankruptcy court's in rem jurisdiction over the Malpractice Claims lapsed after the sale. Thus, because the estate no longer had any interest in these claims, 28 U.S.C. § 1334(e)(1) could not be a source of jurisdiction." *Id.* at 4.

Similarly, there is no property of the estate question here. The court's order does not appear to be contested. There is no impact on administration of the bankruptcy estate and the questions all are under state law. This is purely a dispute between non-debtor parties over non-estate property. There is already an action pending on this issue in state court. There is no reason to be in this court.

2. Preliminary Injunction/Temporary Restraining Order Standard

Plaintiff may not in any case want to keep this court. Even if the court did not abstain, the showing made for a TRO in this motion is very dubious. "The standards for granting a temporary restraining order and a preliminary injunction are identical." *In re Rinard*, 451 B.R. 12, 22 (Bankr. C.D. Cal. 2011). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance

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of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008). "A preliminary injunction is an extraordinary remedy never awarded as of right." *Id.* at 376. These factors do not favor the motion.

A. Likely to Succeed on the Merits

"A preliminary injunction is a provisional remedy. 'It is the function of a preliminary injunction to preserve the status quo pending a determination of the action on the merits.' *King v. Saddleback Junior Coll. Dist.*, 425 F.2d 426, 427 (9th Cir.1970) (citation omitted); *In re Casner*, 302 B.R. 695, 699–700 (Bankr. E.D. Cal. 2003). "The 'merits' always refer to some underlying substantive claim." *Id.* at 700.

Here, the underlying claims in the complaint seek relief based on intentional interference with a business advantage and tortious interference with a contractual relationship. However, as noted by BMI, PMGI fails to address why it would likely win on the merits of these claims vis á vis BMI or why the probate estate necessarily has no claim or that Mr. Watkins' letter is necessarily tortious. Instead, PMGI focuses solely on the issue of whether or not it owns the rights to Debtor's royalty fees. While this may very well be true, this is not determinative of the causes of action asserted in the complaint and why they will likely succeed on the merits. Accordingly, PMGI is some distance from satisfying this prong particularly since BMI denies a "blockade" and seems to take the position that there has been no interference with PMGI's right to access royalty data for purposes of audit.

B. Likely to Suffer Irreparable Harm

Plaintiffs seeking preliminary relief must demonstrate that irreparable injury is likely in the absence of an injunction "Mere injuries, however substantial, in terms of money, time and energy necessarily expended...are not enough' to constitute irreparable injury." *Aznaran v. Church of Scientology of California, Inc.*, 937 F.2d 611 (9th Cir. 1991)(quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974)).

PMGI asserts that their restricted access to BMI's royalty database irreparably

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harmed it, as it was prevented from using information on the database to file termination notices. However, it is not entirely clear that PMGI ever lost access to BMI's royalty database. PMGI asserts that it lost access (albeit temporarily; PMGI argues that their access was only restored once they disputed), whereas BMI asserts that it never restricted PMGI's access. Both parties offer declarations in support. As argued by BMI, even if PMGI's access were restricted at one point, it is unclear as to whether PMGI was *irreparably* harmed. If PMGI had access to other sources of information so that they could file termination notices, BMI's purported restriction wouldn't have caused irreparable harm. In any event, because PMGI now has access to the database, this argument appears moot.

In addition, PMGI has argued that the purported access denial to BMI's database "will continue to result in irreparable harm...and [that] [t]he magnitude of the harm can only be determined if injunctive relief is granted." Reply at 4, lines 14-15. Here, rather than articulate what future irreparable harm is stemming from BMI's alleged past act, PMGI seems to only offer conclusory statements in support. In addition, PMGI contends that the future harm can only be determined once relief is granted. This assertion does not satisfy PMGI's burden of proof. PMGI must establish that they will likely suffer irreparable harm if an injunction does not issue. Simply stating that it will only be able to determine future harm once injunctive relief is granted puts the cart before the horse—PMGI can only receive injunctive relief once irreparable harm is established.

Finally, there appears to be no irreparable injury because PMGI can receive an adequate remedy at law. Here, PMGI is seeking royalty fees it claims to own. Because the remedy sought is ultimately for BMI to turn over royalty proceeds, there is an adequate remedy at law, i.e. damages. Thus, because an adequate remedy at law exists to redress any harm PMGI may have suffered, the irreparable injury prong has not been satisfied here either.

C. Balance of Equities Tip in Favor

It appears that PMGI's only argument advanced in support of this prong is that

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"the balance of hardships tips entirely in favor of PMGI as the victim of the Co-Administrators' tortious scheme and BMI's illogical recalcitrance." Again, PMGI's statements are conclusory and do not sufficiently explain why the balance of equities weighs in its favor. Instead BMI contends the balance of equities weigh in its favor, as BMI could be exposed to liability should BMI distribute royalty proceeds to the wrong party. This argument seems at least plausible. Given that PMGI does not appear to have advanced any substantive arguments as to why the balance of equities weighs in its favor, this prong too has also not been satisfied.

D. Public Interest

This prong is not applicable here, as no clear issues of public interest or public policy appear to be implicated. Accordingly, this requirement need not be addressed.

In sum, PMGI has failed to establish the requisite prongs to obtain preliminary injunctive relief. PMGI's arguments appear to be primarily grounded on conclusory statements that are unsupported. Moreover, PMGI's focus on how it clearly owns the rights to the royalty proceeds seems misplaced here. Ultimately, preliminary injunctions are an extraordinary remedy. Because PMGI does not appear to have met the necessary requirements, a preliminary injunction should not be granted.

But in any case, this is a dispute properly decided in state court as it concerns state law questions between non-debtor parties involving non-estate property and such a state court action is already pending; so the court will abstain.

Deny TRO; Abstain from all further matters in this adversary proceeding in favor of the Superior Court probate proceeding.

Party Information

Debtor(s):

William E Preston

Represented By
MARC L SALLUS
Raymond H. Aver
Janis L Turner

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Defendant(s):

Broadcast Music, Inc. Pro Se

Lettie Debra Preston Pro Se

Rodena Preston Pro Se

Plaintiff(s):

Preston Music Group, Inc. Represented By
Philip D Dapeer
Daniel E Fredenberg

Trustee(s):

Todd A. Frealy (TR) Pro Se